

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LACONNER ASSOCIATES LIMITED
LIABILITY COMPANY,

Plaintiff,

v.

ISLAND TUG & BARGE CO.,

Defendant.

IN ADMIRALTY

CASE NO. CV07-0175RSL

PRETRIAL ORDER

JURISDICTION

This is an action for allision damage to a pier owned by plaintiff over navigable waters of the United States caused by a barge being navigated by defendant. Jurisdiction is vested in this court under 28 U.S.C. § 1333, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 30101, and the general maritime law. This is an admiralty and maritime action within the meaning of Fed. R. Civ. P. 9(h).

PLAINTIFF'S CLAIMS FOR RELIEF

Plaintiff will pursue at trial the following claims arising from tortious damage to real property, under the general maritime law:

1. Diminution of value of pier and shed owned by plaintiff resulting from negligence of

1 defendant.

2 2. Consequential damages incurred in replacing pier in order to mitigate diminution of
3 value of pier and shed.

4
5 **DEFENDANT'S AFFIRMATIVE DEFENSES & CLAIMS FOR RELIEF**

6 1. Plaintiff's damages, if any, were proximately caused by circumstances or events
7 superseding the negligence, if any, of defendant.

8 2. Plaintiff failed to mitigate its damages.

9 3. Plaintiff had a duty to preserve relevant evidence. In destroying relevant evidence,
10 plaintiff's actions were improper and constituted spoliation.

11 4. The repair and planned repair of plaintiff's pilings, building and other property has
12 resulted in substantial betterment to plaintiff's property and its recovery, if any, should be reduced
13 to reflect depreciated value and/or betterment.

14
15 **ADMITTED FACTS**

16 The following facts are admitted by the parties:

17 1. Plaintiff is the owner of real property, including tidelands, located in La Conner
18 Washington, which on July 17, 2006 included a 60 foot by 30 foot pier covered with a shed
19 extending west into the Swinomish Channel on the navigable waters of the Puget Sound.

20 2. On the evening on July 17, 2006, the tug ISLAND STORM, operated by defendant, was
21 pushing two barges having a combined width of 90 to 100 feet north through the Swinomish
22 Channel. After passing safely under the Rainbow Bridge, just south of the town of La Conner, one
23 of the barges allided with a pile driving barge moored immediately to the south of plaintiff's pier.
24 The pile driving barge was then pushed under plaintiff's pier causing damage.

25
26 **Plaintiff's Contentions**

27 The plaintiff contends as follows:
28

1 1. The pier referred to above, in addition to its main dimensions of 60 feet by 30 feet,
2 included an open loading area 15 foot wide by 30 foot long.

3 2. The pier, its supporting pilings and structures, and shed were existing non-conforming
4 uses so far as zoning ordinances. The pier encroached on the street right of way of the Town of
5 LaConner. The parcel of property on which the pier was located, with the pier and shed in place had
6 a value of approximately \$1,500,000 prior to the casualty that is the subject of this action.

7 3. As a result of this damage to the pier it constituted a hazard to public safety and pollution
8 of the waterway, which required its removal or repair. Because of the existence of the pier as a
9 nonconforming use and its encroachment onto the street right of way of the Town of LaConner,
10 repair as such was not allowable. Removal of the pier and shed without replacement would have
11 resulted in greater diminution of value of the property than would rebuilding it to existing
12 dimensions, with design and materials that would meet then-current building codes. The cost of
13 rebuilding the pier and shed to its existing dimensions, moving the pier a foot or so to eliminate the
14 encroachment on the street right of way, would have been a minimum of \$407,000. As a result of
15 this casualty, the fair market value of the property comparing its value immediately prior to the
16 casualty with its value in the damaged condition immediately subsequent to the casualty was
17 diminished as a result of the casualty by at least \$407,000.

18 5. To meet its obligations to abate the hazard to public safety and danger of pollution the
19 damaged pier presented, plaintiff promptly elected to remove the pier and, to mitigate diminution
20 of value that would have resulted if the pier was not promptly replaced, proceed with replacing it
21 with a pier of slightly different dimensions and other improvements to the property for which permits
22 had been granted, at a cost exceeding \$500,000, not including replacement of the shed, which to this
23 day has not been replaced. Plaintiff had to borrow those funds at a cost of about 10% annual
24 interest and loan fees, which plaintiff might have elected to not incur but for this casualty, as plaintiff
25 had a limited line of credit available which it needed as a reserve for interests payments and other
26 expenses it would incur before it could either sell its interest in the property in the entirety or sell
27 part of it to a joint venture development partner to develop the property for other purposes. In
28

1 addition to the cost of interest, the shortage of funds that could have been used to pay future interest
2 and other expenses that resulted from plaintiff incurring this expense may have resulted in plaintiff
3 having to sell its interest in the property at less than fair market value.

5 **Defendant's Contentions**

6 Defendant contends as follows:

- 7 1. Defendant denies all of plaintiff's contentions.
- 8 2. Plaintiff razed the pier and shed within days of the allision, without seeking the opinion
9 of an engineer, surveyor, or disinterested contractor as to the possibility of repairing the structure.
- 10 3. The property that forms the basis of the suit is referred to by the plaintiff as the "Crab
11 Shack." The Crab Shack was built in the early to mid 20th Century. The Crab shack was a
12 dilapidated single story, stick frame building with a rusty sheet metal exterior.
- 13 4. The Crab Shack structure and the land upon which it is situated is part of a 3.02 acre
14 parcel of land that was purchased by plaintiff in 1996. Plaintiff's admitted intention has always been
15 to redevelop the site into a mixed use residential and commercial property that took advantage of
16 its prime location along the La Conner waterfront. The project is commonly referred to as "The
17 Moore-Clark Project."
- 18 5. Part of the Moore-Clark Project called for the demolition and removal of several over-
19 water structures. The structures to be demolished included the Crab Shack, its support deck, and
20 its pilings. After the planned demolition and removal of the Crab Shack, its supports deck, and
21 pilings, plaintiff intended to reconstruct in their place a larger deck, a floating dock and a large
22 multilevel building, which would eventually house a waterfront restaurant.
- 23 6. By the summer of 2006, plaintiff had spent several years and expended hundreds of
24 thousands of dollars (including litigation with the Town of LaConner) to obtain the necessary
25 permits from federal, state, and local agencies to begin work on the project.
- 26 7. Prior to the incident, plaintiff admittedly had every intention of demolishing the Crab
27 Shack structure in the fall of 2006.

1 8. Plaintiff was required by its permits to begin demolition and reconstruction of the Crab
2 Shack before the end of 2006.

3 9. Any “in-water” work related to the Crab Shack demolition and reconstruction had to be
4 done within the fisheries window that began on July 16, 2006.

5 10. Defendant denies it is liable for the alleged damage caused to plaintiff’s property.

6 11. After the incident, plaintiff proceeded with its plan to demolish the Crab Shack structure
7 without regard for the possibility that the structure could be repaired in place or otherwise secured
8 in order to mitigate any potential safety or environmental threat.

9 12. Plaintiff was solely responsible for the decision to demolish the Crab Shack.
10 Plaintiff failed to mitigate its damages by proceeding with the demolition and reconstruction of the
11 Crab Shack structure without first engaging the opinion of a qualified engineer, disinterested
12 contractor, or marine surveyor regarding the possibility of repairing or securing the existing
13 structure.

14 13. Plaintiff had several options available to it to either repair the structure or secure the
15 structure so that it did not pose a threat to safety and/or damage to the environment. Plaintiff chose
16 instead to demolish the structure and remove the debris.

17 14. Plaintiff failed to properly investigate whether the structure could be repaired or
18 otherwise secured because it had already planned to demolish the structure pursuant to the
19 requirements of existing permits and according to its preexisting construction schedule. Plaintiff
20 chose instead to demolish the structure and remove the debris.

21 15. Plaintiff was not ordered by any local, state, or federal governmental agency to demolish
22 the Crab Shack structure. Nevertheless, plaintiff chose to demolish the structure and remove the
23 debris.

24 16. If the Crab Shack structure was an existing non-conforming use, so far as zoning
25 ordinances were concerned, the non-conforming nature of the property would not have precluded
26 plaintiff from either shoring up the structure until such time as it was ready to proceed with its
27 scheduled demolition and replacement or repairing the existing structure itself.

1 17. Plaintiff's damages, if any, are limited to the cost of stabilizing the Crab Shack for the
2 one or two month interval between the incident, the planned demolition, and reconstruction of the
3 structure.

4 18. Plaintiff has not suffered any consequential damages as a result of the alleged incident.

5 19. Any damage to plaintiff's property has not affected its investment in the overall Moore-
6 Clark Project.

7 8 **ISSUES OF LAW**

9 **Plaintiff's Statement of Issues of Law**

10 Plaintiff anticipates the following issues of law will be presented by this case, other than the
11 usual issues of general maritime law applicable to liability for negligence of a party whose negligence
12 causes damages to the property of another:

13 1. The rule for the measure of damages under the general maritime law in a case of this
14 nature is the difference in value between the property before and after the casualty, together with
15 incidental and consequential damages resulting therefrom.

16 2. Under the general maritime law, interest normally is awarded.

17 18 **Defendant's Statement of Issues of Law**

19 Defendant anticipates the following issues of law will be determined by the court:

20 1. Whether and to what extent, if any, plaintiff is entitled to damages.

21 2. Whether plaintiff is entitled to prejudgment interest.

22 3. Other issues that may arise during the trial of the case.

23 24 **EXPERT WITNESSES**

25 (a) Each party shall be limited to one expert witness on the issues indicated below.

26 (b) The names and address of the expert witnesses to be used by each part at the trial and
27 the issue upon which each will testify is:
28

1 (1) On behalf of plaintiff:

2 David Parsons
David Parsons & Associates, Inc.
3 1316 E College Way
Mount Vernon WA 98273
4 360-428-8544

5 Mr. Parsons will testify in person as to his opinion of the diminution of value of plaintiff's
6 property as a result of this casualty.

7 (2) On behalf of defendant:

8 Bill Gerken
PND, Inc.
9 811 First Avenue, Ste 570
Seattle, Washington 98104
10 Ph: 206.624.1387

11 Mr. Gerken is an engineer and shoreside permitting specialist. He will testify as an
12 expert witness regarding damage issues.

13 Bill Gunderson
PND, Inc.
14 811 First Avenue, Ste 570
Seattle, Washington 98104
15 Ph: 206.624.1387

16 Mr. Gunderson is an engineer and will testify as an expert witness regarding damages
17 issues.

18
19 **WITNESSES TO BE CALLED BY PLAINTIFF**

20 Plaintiff may call the following witnesses:

21 (A) **Identities of potential witnesses.** Identities of each individual likely to have
22 discoverable information relevant to disputed facts alleged with particularity in the pleadings:
23
24
25
26
27
28

1 Vaughn Jolley
 2 Managing member,
 3 LaConner Associates LLC
 4 813 S 2nd St.
 5 LaConner WA 98257
 6 360-466-1258

Will testify in person as to the pre-casualty condition and value of the pier and shed and the property on which they were located, and their post-casualty condition. He will testify as to the requirements of the City of LaConner that the damaged building and pier be removed, the costs of removal, the cost of replacement if replacement could have been allowed, and the costs of replacement of the pier and building, including costs of the effect of earlier-than-planned work on financing and construction of the project and development of the adjacent property.

7 John Carlson
 8 Carlson Construction, Inc.
 9 PO Box 943
 10 LaConner WA 98257
 11 360-466-4550

Will testify in person as to his knowledge of the pre-casualty condition of the pier and shed, his observations of the circumstances of the damage to plaintiff's pier immediately after the accident, including his conversations with representatives of defendant over the next few days, his observations as to the nature and extent of damage to plaintiff's pier and the reasonableness of alternatives regarding repair or replacement, the probable costs of repair and the costs of replacement.

14 WITNESSES TO BE CALLED BY DEFENDANT

15 Defendant may call the following witnesses:

16 Defendant may call the following witnesses:

17 (A) **Identities of potential witnesses:** Identities of each individual likely to have
 18 discoverable information relevant to disputed facts alleged with particularity in the pleadings:

19 1. Vaughn Jolley
 20 c/o Plaintiff's counsel

21 Mr. Jolley is a member of LaConner Associates LLC. He will testify regarding liability and damages issues.

22 2. Frank Ellefsen
 23 c/o Bauer Moynihan & Johnson LLP

24 Mr. Ellefsen is the owner of Island Tug and Barge. He will testify regarding damages issues.

25 3. Dave Wells, Jr.
 26 Lakeshore Construction
 27 Mukilteo, Washington 98275
 28 Ph: 206.730.3643

Mr. Wells is a contractor. He is a possible witness who will testify regarding damages issues.

4. John Doyle
Town of La Conner, Town Administrator
204 Douglas
La Conner, Washington 98257
Ph: 360.466.125

Mr. Doyle is the Town Administrator for the Town of La Conner and he will testify regarding damages issues.

5. Jodi Widmann
Vice President, North County Bank
1031 State Avenue
Marysville, Washington 98270
Ph: 360.657.3100

Ms Widmann is the loan officer responsible for LaConner Associates line of credit for the Moore-Clark Project. She is expected to testify regarding damages issues.

6. Scott Robinson
CPR Management Services
4005 20th Avenue West, Ste 228
Seattle, Washington 98199
Ph: 206.838.8490

Mr. Robinson participated in the investigation following the accident. He is a possible witness and may testify to issues regarding damages.

7. Peter Mason
Alexander Gow, Inc.
221 1st Avenue West, Suite 115
Seattle, Washington 98119-4223
Ph: 206.285.9243

Mr. Mason is a surveyor who participated in the investigation following the accident. He is a possible witness and may testify to issues regarding damages.

Defendant reserves the right to call all witnesses identified by plaintiff.

EXHIBITS TO BE OFFERED BY PLAINTIFF

Admissibility Stipulated:

Exhibit 1	Pre-casualty aerial photo of project
Exhibit 2	Pre-casualty photo of project from Rainbow Bridge
Exhibit 3	Pre-casualty photo of pier/shed
Exhibit 4	Pre-casualty photo of loading deck
Exhibit 5	Four photos post-casualty damage

Exhibit 6 Post-casualty reconstructed pier
Exhibit 8 Jolley e-mail to Jacobson
Exhibit 10 Letter of September 19, 2006, to Jacobson, as redacted.

DEFENDANT'S EXHIBITS

Admissibility stipulated:

- 500. Transcript from the June 5, 2007 deposition of Vaughn Jolley
- 501. Transcript from the November 29, 2007 deposition of Vaughn Jolley
- 502. Exhibit 1 to the June 5, 2007 deposition of Vaughn Jolley
- 503. Hydraulic Project Approval Permit dated August 23, 2004
- 504. Army Corps Permit and attachments dated August 10, 2004
- 505. Department of Ecology Water Quality Certification dated November 19, 2004
- 506. Shoreline Substantial Development Permit dated December 16, 2000
- 507. ISLAND STORM deck log book dated July 17, 2006
- 508. ISLAND STORM deck log book dated July 18, 2006
- 509. April – September 2006 Development Budget
- 510. April – September 2006 Development Budget attached to plaintiff's responses to defendant's requests for production.
- 511. Gerken report
- 512. Gerken CV
- 513. Gunderson report
- 514. Gunderson sketch of pilings
- 515. Gunderson CV
- 516. Demolition Invoices
- 517. Illustrations of the new Crab Shack building
- 518. Construction drawings by Bob Patterson
- 519. Site Development Plans

- 1 520. July 26, 2006 e-mail from Vaughn Jolley to Joann Gustafson (Washington State Department
- 2 of Natural Resources)
- 3 521. July 31,2006 letter from Joann Gustafson (Washington State Department of Natural
- 4 Resources) to Vaughn Jolley
- 5 522. August 11, 2006 letter from Joann Gustafson (Washington State Department of Natural
- 6 Resources) to Vaughn Jolley
- 7 523. June 7, 2006 letter from Vaughn Jolley to John Doyle
- 8 524. July 10, 2006 Town of LaConner letter regarding Certificate of Authorization
- 9 525. July 20, 2006 letter from John Doyle, Town of La Conner Town Administrator, to Vaughn
- 10 Jolley
- 11 526. August 28, 2006 Town of La Conner Certificate of Authorization
- 12 527. August 22, 2006 memorandum from Vaughn Jolley to Jodi Widmann
- 13 528. April 26,2007 e-mail from Vaughn Jolley to Jodi Widmann
- 14 529. Pre-casualty photo of Crab Shack building
- 15 530. Post casualty photo of Crab Shack building
- 16 531. Post casualty photo of Crab Shack building
- 17 532. Post casualty photo of Crab Shack building
- 18 533. Photos of interior of Crab Shack building
- 19 534. Photo of new deck structure
- 20 535. Photo of new deck structure from across the channel
- 21 536. Photo of new deck structure and float from across the channel
- 22 537. Arial photograph of Moore-Clark facility.
- 23 538. Preliminary waterfront improvement plan dated July 13, 2006
- 24 539. Preliminary waterfront improvement plan dated July 20, 2006
- 25 540. Waterside development plan dated December 27, 2006
- 26 541. Plaintiff's responses to defendant's interrogatories and requests for production
- 27 542. Development Agreement between LaConner Associates and the Town of La Conner
- 28

543. GVA Kidder Matthews marketing documents regarding the LaConner Associates property.
544. Screen captures from LaConner Associates website
545. Town of La Conner Town Administrator responsibilities document
546. April 27, 2007 e-mail from Charles Davis to Tom Waller
547. May 1, 2007 e-mail from Charles Davis to Tom Waller re: rejection of Development Agreement
548. May 2, 2007 e-mail from Charles Davis to Tom Waller regarding SMP approval
549. June 22, 2007 e-mail from Charles Davis to Tom Waller
550. August 13, 2007 e-mail from Charles Davis to Tom Waller
551. Peter Mason photographs, diagram, and e-mail
552. C J Munson Self Contained Appraisal Report dated January 1, 2007
553. C J Munson Limited Appraisal, Summary Report dated March 15, 2006
554. Post casualty photo
555. Post casualty photo
556. Post casualty photo

Authenticity admitted, admissibility disputed:

Plaintiff's Exhibits

- | | |
|------------|---|
| Exhibit 7 | Parsons' Report |
| Exhibit 9 | Attachment to Jolley e-mail to Jacobson |
| Exhibit 17 | LaConner Municipal Code § 10.10.455 |
| Exhibit 18 | LaConner Municipal Code § 15.125.010 |

ACTION BY THE COURT

- (a) This case is scheduled for trial without a jury on June 2, 2008 at 8:30 a.m.
- (b) Trial briefs shall be submitted to the court on or before May 26, 2008.

1 This order has been approved by the parties as evidenced by the signatures of their counsel.
2 This order shall control the subsequent course of the action unless modified by a subsequent order.
3 This order shall not be amended except by order of the court pursuant to agreement of the parties
4 or to prevent manifest injustice.

5 DATED this 23rd day of May, 2008.

7 

8 Robert S. Lasnik
9 United States District Judge

10
11
12 FORM APPROVED

13 s/ Charles M. Davis

14 WSBA # 5088

15 LAW OFFICE OF CHARLES M. DAVIS

16 4767 Wharf Road

17 Bow WA 98232

18 Telephone: 360-766-3223

19 Fax: 360-766-4014

20 E-mail: cdavis@davismarine.com

21 Attorney for Plaintiff

22 BAUER MOYNIHAN & JOHNSON LLP

23 s/

24 Thomas G. Waller, WSBA No. 22963

25 Joseph M. Browne, WSBA No. 36580

26 Attorneys for defendant

27 Bauer Moynihan & Johnson LLP

28 2101 Fourth Avenue, Suite 2400

Seattle, WA 98121

Tel: (206) 443-3400 Fax: (206) 448-9076

E-mail: tgwaller@bmjlaw.com

E-mail: jmbrowne@bmjlaw.com